Free Speech & Election Law

No Cure for Corruption: Public Financing under Constitutional Constraints

*By David M. Mason**

Barack Obama's victory over John McCain was due in no small part to his spending advantage.[1] He gained that advantage by collecting private donations, rather than accepting a public grant accompanied by a spending limit. Yet Obama felt compelled to defend his decision by calling for "reform" of a system he described as broken and claiming his would be "first general election campaign that's truly funded by the American people."[2] Some of Obama's supporters and a chorus of "reform" organizations continue to advocate "updating" the public financing system.[3]

As John McCain discovered, the biggest threat to public financing is competition from the private sector. Since *Buckley v. Valeo* declared that the government could not prohibit private fundraising, public financing schemes have had to compete with a parallel system of private financing.[4] While the initial subsidies in the Presidential public financing program were sufficiently rich to induce candidates to accept limits on spending and private contributions, over time private financing methods improved and public financing became less attractive. Rather than increasing subsidies, public financing advocates initially reacted by attempting to impose new limits or burdens on private financing.[5]

Trends in technology and constitutional interpretation are likely to continue, however, to make public financing—at least that associated with spending limits—unattractive. Low-cost, high-volume Internet fundraising has overwhelmed spending limits associated with traditional public financing schemes. At the same time, courts have clarified that public funding schemes may not coerce or handicap privately-funded candidates, for instance by giving advantages to publicly-funded candidates on account of an opponent's private fundraising. Further, courts have increasingly limited the rationales sufficient to justify limits on private political financing, and therefore expanded the scope and volume of private financing. The Supreme Court's recent order for rehearing in *Citizens United v. FEC* gives a strong hint that the Court will extend this trend.[6] Reform proposals have finally adapted with increasing subsidies and by increasing or eliminating spending limits.

In an era of broad-based Internet fundraising, public financing begins to look like a cure in search of a disease. Even worse, the super-subsidies required to compete with Internet-enabled fundraising offer powerful inducements to the fraud and corruption that campaign finance laws are purportedly intended to prevent. A campaign finance scheme enabling corruption is not a cure worse than the disease: it is a contagion masquerading as a cure.

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It's the Doctrine, Dummy

An understanding of the public financing advocates' dilemma must begin with a review of the Supreme Court's increasingly structured campaign finance jurisprudence. That review begins with *Buckley v. Valeo*.[7] While *Buckley* established that all campaign activity was protected by the First Amendment, the *per curiam* opinion was notably imprecise about what standard of review applied.[8] *Buckley* failed to utilize any traditional form of constitutional review: strict, intermediate or rational basis scrutiny, settling instead for "exacting," with little further description.[9] *Buckley* then applied this "standard" separately and with varying results to campaign spending (generally not limited), contributions (subject to limits) and mandatory disclosure (generally, though not always permissible). This has led some subsequent cases to refer simply to "*Buckley's* standard," without, however, adding any content to that description.[10]

This doctrinal imprecision has led to a confused welter of decisions, some appearing suspiciously outcome-based. The Massachusetts Citizens for Life, for instance, we permitted to expend corporate funds on candidate advocacy because they were small (deriving funds from activities such as bake sales) and ideologically motivated.[11] The Michigan Chamber of Commerce, on the other hand, was muzzled because it was too big, and might have had the wrong sort of motives.[12] Because no First Amendment principle distinguishes large from small organizations or justifies probing a speaker's motives, the *Austin* court rested its holding on alleged abuse of the corporate form: the unfairness of deploying resources gained in the economic marketplace in the political arena.[13] Yet earlier in *Buckley* and subsequently in *Davis v. FEC*,[14] the Court insisted that wealthy individuals, most of whom presumably obtained their riches in the economic marketplace, have an absolute First Amendment right to deploy that wealth in political campaigns.

Similarly divergent outcomes have emerged in contribution limit cases. In *Nixon v. Shrink Missouri Government PAC*, the Court decided, based on a "sliding scale" allegedly derived from *Buckley*, that contribution limits as low as $250 for certain offices were permissible.[15] Yet in *Randall v. Sorrell*, the Court determined $25 was below the constitutional minimum.[16]

What emerges is not a single "Buckley" standard of review, but three standards: strict scrutiny for limits on political speech and spending, "close" or "exacting" scrutiny for disclosure requirements,[17] and a third standard for contribution limits. The contributions analysis begins with a requirement for a compelling government interest, apparently identical to the "strict scrutiny" analysis. Yet the cases readily find that interest in the objective of preventing corruption or the appearance of corruption, with little real examination, and no requirement for any evidentiary record.[18] However, courts have failed to apply

the "narrow tailoring" prong representing the other half of strict scrutiny to contributions, claiming to possess no judicial "scalpel to probe…."

In practice, prior to *Randall*, this meant the courts simply deferred to legislative judgment. While *Randall* drew a line against this deference to legislatures, it provided little doctrinal or theoretical guidance for future cases. The *Randall* analysis rested on a detailed examination of the complex Vermont contribution limits regime, which was in many respects not terribly different from the Missouri law the court had upheld in *Shrink*. One difference cited, for instance, was the lack of an indexing provision in Vermont, a rather narrow basis on which to find a distinction of constitutional import. [19]

To the extent *Randall* had a doctrinal basis, it rests in the requirement that any contribution limit cannot be set so low as to prevent a candidate from amassing resources sufficient for a campaign.[20] In addition to providing no yardstick for "sufficiency," this formulation appears more akin to a balancing test (the government's *interest* in preventing corruption balanced against the candidate's *interest* in sufficient campaign funds) than a formulation designed to protect constitutional *rights*.

Strict Scrutiny

Against this confused background, the enduring contribution of *FEC v. Wisconsin Right to Life* may be its deployment of two magic words: "strict scrutiny," followed by a classic statement that this standard required a compelling government interest and a remedy narrowly tailored to achieving that interest.[21] *WRTL* cited numerous campaign finance cases holding that a "compelling interest" was necessary to justify burdens on political speech, including *Buckley*, though the cited section in *Buckley* did not use this term. Other than *Austin*, however, none of the cited cases used the classic (and often fatal) "narrow tailoring" requirement, instead using terms such as "sufficiently related" or "closely drawn." Whatever distinctions may be discernable among these terms in plain English, the studied refusal, prior to *WRTL*, to use the phrase strict scrutiny or to couple the two parts of that test left the campaign finance field open to disparate standards of interpretation.

The significance of *Davis* amidst the jumble of scrutiny tests is twofold. First, *Davis* defined certain devices styled as contribution limits to be, in effect, limits (or at least burdens) on spending, subjecting them to strict scrutiny under *WRTL*. In this category are the various increased contribution limits for one candidate, based on another candidate's spending that were directly at issue in *Davis*, and, by its favorable citation of *Day v. Holahan*, increases in limits triggered by independent spending opposed to a candidate.[22] Notably, the devices at issue in *Davis* and *Day* were not limits on a candidate's or interest group's spending, merely burdens.

Second, *Davis* clarified that any such burden required compelling justification, and effectively reiterated a long series of precedents holding that preventing corruption was the only compelling justification for burdening private financing. *Davis* rejected several weakly proffered government interests including informational interests, or saving candidates' time. The opinion was particularly harsh in criticizing the purported interest in equalizing candidates' resources. Far from being compelling, the "leveling" argument was described as "ominous" and "dangerous."[23]

Given that *Davis* explicitly undermined the rationale of *Austin*, and cited Justice Kennedy's dissent in that case, the *Citizens United* order expressly asking for briefing on whether *Austin* should be overturned has been greeted by many as a fait accompli.[24]

The Death of Public Financing

The likely fatal implications of *Davis* for state "clean elections" schemes was discussed here in the last issue.[25] For the Federal Presidential public financing system, and proposals to revive it, the effects are more subtle, though in the end perhaps no less fatal. The nub of the problem is that Federal public financing schemes, like most of their state counterparts, historically have been coupled with limits on private contributions to, and overall spending by the publicly-financed candidates. *Davis* foreclosed coercive efforts to limit private spending in competition with public funding. Moreover, by undermining the rationale for limitations on corporate spending, *Davis*, and now *Citizens United,* threaten public financing schemes with even greater competition from voluntary, private spending.

The Presidential public financing system consists of two programs. During primaries candidates are offered matching funds of up to $250 from each contributor. Candidates who accept the finds are subject to a number of requirements, most significantly a limit on overall spending. In the general election major party candidates may elect to receive a grant intended to fully fund the campaign, in return for eschewing all private funding. Between 1976 and 1996 virtually every presidential candidate opted in to both programs.

Since 2000 candidate participation in the public funding programs has eroded precipitously. In 2000 George W. Bush chose to forgo matching funds in the primary, calculating that he could raise far more in private funding, even at the cost of the $250 match. In 2002 the McCain-Feingold legislation doubled the contribution limit from $1,000 to $2,000 and indexed it for inflation. McCain-Feingold did not, however, alter the presidential public funding laws. The effect was to reduce the value of the primary matching funds in comparison to the maximum allowable contribution by half from 1:4 to 1:8. By the next Presidential election the ratio will fall further to around 1:10 due to indexing of the contribution limit. During the same period candidates, were able to harness Internet fundraising to increase significantly the number and overall value of smaller donations. As a result, all of the strongest candidates opted out of the primary matching fund system in 2004, and only the weakest candidates accepted matching funds in 2008. Also last year Barack Obama chose to decline the general election grant, and was able to able to marshal $375 million for the general election, overwhelming the $84 million public grant paid John McCain.[26] Based on this experience McCain declared public financing "dead."[27]

Reviving the Dead: Will Subsidies Do?

The death of the presidential public funding system has produced, naturally, calls to revive it. Revival requires, it seems more money: a far richer regime of subsidies to induce

candidates to accept public funding. Leaving aside the wisdom or political appeal of these proposals, the constitutional question raised by these subsidies is whether they are so rich as to encourage the very corruption the prevention of which is the constitutional and political *raison d'etre* for the very existence of public financing.

Davis affected the leading proposal to alter the presidential public financing program nearly as dramatically as it upset state "clean elections" laws. The Presidential Funding Act of 2007 proposed to increase spending limits and subsidy levels for publicly-funded candidates in presidential primaries based on spending by their privately-financed opponents. For the general election, the bill would have doubled, from $100 to $200 million the grant for candidates facing privately-funded opponents who raised more than $300 million for the primary and general elections combined.[28] *Davis* clearly placed such burdens on private spending out of constitutional bounds.[29]

Sponsors of the public financing scheme for Congressional elections have reacted to this constitutional squeeze by giving up on explicit spending limits altogether.[30] Prior versions of the Congressional public financing legislation, like the Presidential scheme, employed subsidies to induce candidates to accept spending limits.[31] Since candidates are apparently no longer willing to accept this bargain, the spending limits are dropped, and the subsidy regime is sweetened for no purpose other than to induce candidates to accept the subsidies. The current version of the "Fair Elections Now Act" would provide over $12 million in subsidies to a Senate candidate for the primary and general elections in a medium-sized state in return for, and in addition to, approximately $2 million in private contributions.[32] Advocates of presidential public funding have not quite given up on spending limits, though one proposes increasing the limit to over $500 million for the combined primary and general election campaigns.[33]

A key feature of both the Presidential Funding Act and the Fair Elections Now Act is a matching fund system providing a government grant four or five times the value of small contributions ($100 in the congressional scheme, $200 in the presidential). While the funding scheme could reach a similar result in terms of value to a candidate by retaining a 1:1 match but increasing the matchable component to $1,000 or more, public financing advocates have another aim. They seek to make a $200 contribution worth as much to a candidate as a $1,000 or larger contribution. Public financing advocates seek, in other words, to equalize the financial voices of smaller and larger donors. This purpose may be permissible under prevailing jurisprudence as an exercise of Congress's spending or welfare powers, but after *Davis* it does not represent an interest sufficient to infringe upon candidates' or contributors constitutional rights.[34] Indeed, such an ominous and dangerous policy might even exceed the broad contours of the spending clause as no consistent with the general welfare.

Corruption on Steroids

The problem with multiple matching schemes is that they will inevitably, and substantially, increase corruption in the campaign finance system. The very existence of campaign contribution limits has sparked a variety of permissible efforts to avoid them (such as independent spending by a candidate's supporters), controversial efforts to supplement them (such as with political party soft money or cost sharing), and plainly illegal efforts to evade them. The most common form of evasion is for a wealthy donor to reimburse employees, associates, friends and relatives for making contributions to campaigns. An Ohio coin dealer admitted to giving $45,400 illegally in such a scheme and went to jail.[35] In other instances, corporations reimburse employees for campaign donations. Little Rock attorney Tab Turner admitted to reimbursing approximately $10,000 in contributions from employees and relatives and paid a $50,000 fine.[36]

The era of Internet fundraising appears to have made such outright lawbreaking easier to execute and more difficult to remedy. The Obama campaign, for instance, initially accepted thousands of small contributions from fictitious donors with improbable names such as Doodad Pro ($17,130) and Good Will ($11,000).[37] Unlike Turner, who left a trail of checks and paper credit card receipts, Mr. Pro and Mr. Will left only virtual tracks and apparently received no punishment other than getting their money back.

The presence of matching funds provides a dramatically increased incentive for conduit contributions: the returns of the illegal scheme are increased by the government match. Perpetual candidate Lyndon LaRouche had repeated run-ins with the FEC over improper efforts to establish or increase eligibility for matching funds.[38] Some candidates appear to have decided to campaign for the Presidency in part in order to multiply the value of otherwise legitimate contributions through the primary match fund program. These cause-oriented candidates simply transferred permanent staffs and fundraising efforts of their political organizations over to a presidential campaign in order to get the benefit of a government subsidy (along with the notoriety of running for President).

With government subsidies of 400 or 500% of small contributions, it is all too easy to imagine an ACORN-like scheme in which an army of street-level fundraisers are paid bounties to find small donors with no questions asked. Like walking-around money on election day, campaigns would not be paying people to contribute, just paying people to find contributors. And if the contributors they found happened to be family members, friends, and neighbors, what could be more natural?

Even absent out-and-out fraud, professional fundraising organizations would find the magnetic attraction of a 4:1 match impossible to resist. Certain causes are capable of raising millions of dollars a year through direct mail and phone bank efforts, but end up netting only pennies on the dollar.[39] Under a 4:1 public financing scheme, such organizations can simply anoint a prominent spokesman as a candidate, and turn a big profit. Supporters of public financing might well regret loosing the voices such a scheme would equalize.

If it has caused campaign reformers to abandon efforts to stifle political debate through spending limits, *Davis* represents a great step forward. Because pure (subsidy-only) public financing schemes do not limit rights, they are less likely to suffer judicial invalidation. For this reason it is all the more important for policymakers to consider the corruption-inducing aspects of

massive government subsidies for political movements before embracing them as a cure for what ails the political system.

Endnotes

1 Karl Rove, *McCain Couldn't Compete with Obama's Money*, Wall St. J., Dec. 4, 2008, http://online.wsj.com/article/SB122835139848377873.html.

2 *Obama Opts Out of Public Financing,* USA Today, June 19, 2008, http://blogs.usatoday.com/onpolitics/2008/06/obama-opts-out.html.

3 The Presidential Public Financing Reform Project, for instance, including Common Cause, League of Women Voters, Public Citizen, Public Campaign US PIRG and Democracy 21 describes its goal as to "reform the system so that it is adequately funded and can serve its original goals." http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4773833.

4 424 U.S. 1 (1976).

5 The Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold"), for instance attempted to impose new limits on political party spending in support of Presidential nominees, and on political party financing (much of which was seen as associated with presidential campaigns). State "clean campaign" statutes, which also attempt to impose burdens on private financing competing with public funding are discussed below.

6 Order Number 08-205, http://www.supremecourtus.gov/orders/courtorders/062909zr.pdf.

7 424 U.S. 1.

8 Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387 (2000) ("Precision about the relative rigor of the standard to review contribution limits was not a pretense of the *Buckley per curiam* opinion.").

9 *Id.*

10 *Id.* at 387; McConnell v. FEC, 540 U.S. 93, 103 (2003); Randall v. Sorrell, 548 U.S. 230, 266 (2006) (Thomas concurring).

11 FEC v. MCFL, 479 U.S. 238, 242 (1986).

12 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 662 (1990).

13 *Id.* at 659.

14 128 S.Ct. 2759 (2008)

15 528 U.S. 377, 391.

16 548 U.S. at 253.

17 *See Davis,* 128 S.Ct. at 2774-2775 (citing *Buckley*, 424 U.S. at 64).

18 Shrink Missouri, 528 U.S. at 393 ("whatever the State's evidentiary obligation may be" satisfied).

19 548 U.S. at 261.

20 *Id.* at 253-54.

21 551 U.S. 449, 127 S.Ct. 2652, 2664 (2007); *see also Austin*, 494 U.S. at 655 (upholding statute as "narrowly tailored to serve a compelling state interest," without using phrase "strict scrutiny").

22 128 S.Ct. 2759, 2772 (citing Day v. Holohan, 34 F.3d 1356, 1359-1360 (8th Cir. 1994)).

23 *Id.* at 2773-74.

24 *See, e.g.*, Adam Liptak, *Court Appears Poised to Rewrite Spending Rules*, N.Y. Times, June 29, 2009, http://www.nytimes.com/2009/06/30/us/politics/30movie.html?_r=2.

25 William R. Maurer & Timothy D. Keller, Davis v. FEC *and the Constitutionality of "Clean Elections" Systems*, 10 Engage 1.

26 Obama had $7.4 million cash on hand on September 1 available for the General Election and raised $153 million in September and approximately $148 million through the November election. Source: FEC filings, available at http://www.fec.gov.

27 *McCain: Public Financing is Dead*, Wash. Times, Mar. 29, 2009, http://www.washingtontimes.com/news/2009/mar/29/public-financing-dead-mccain-says/28; S. 2412, 110th Congress, *see* http://feingold.senate.gov/issues_presfunding.html.

29 *See* Maurer & Keller, *supra* note 25.

30 S. 752, 111th Congress.

31 S. 1285, 100th Congress.

32 For a state with 10 congressional districts, grants totaling $3.74 million, a general election broadcast voucher of $1 million, and up to $7.48 million in matching funds.

33 *Reform Groups Push Revised Proposal to Revamp Presidential Campaign System*, BNA Daily Report for Executives, November 7, 2008.

34 *Davis,* 128 S.Ct at 2773-2774.

35 *Ohio Fund-Raiser Pleads Guilty in a Campaign Finance Case*, N.Y. Times, June 1, 2006, http://query.nytimes.com/gst/fullpage.html?res=9E00EFDE1631F932A35755C0A9609C8B63.

36 FEC MUR 5366, http://eqs.nictusa.com/eqsdocs/000054BF.pdf.

37 Michael Issikoff, *Good Will Hunting*, Newsweek, Oct. 4, 2008, http://www.newsweek.com/id/162403; *Obama's Funny Money*, Pitt. Trib. Rev., Oct. 5, 2008, http://www.pittsburghlive.com/x/pittsburghtrib/opinion/archive/s_591519.html.

38 LaRouche v. FEC, 966 F.2d 1263 (D.C. Cir. 1993); *see also* FEC MUR 4977, Buchanan for Presidnet, Inc.

39 Matthew Mosk, *In Fundraising's Murky Corners*, Wash. Post, Aug. 13, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/12/AR2007081201371.html.